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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MICHAEL HARRIS,
Petitioner,

v.

RADIO-ELECTRONICS OFFICERS UNION, and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTION

The Court should deny the petition of Michael Harris ("Harris" or "Petitioner") because (1) Questions II and III presented by Petitioner are based on the incorrect premise that this case involves a "closed shop," although neither the National Labor Relations Board ("Board") nor the Court of Appeals found a "closed shop" and the record establishes that the Union's hiring hall was available to both members and non-members; (2) Question IV is similarly based on the erroneous assumption that this case involves a "union security agreement" when the Board specifically found, and the Court of Appeals affirmed, that there was no evidence of a union security agreement in the record; and (3) Questions I and V do

not raise "an important question of federal law,"[1] but merely ask this Court to second-guess the Court of Appeals' applicaiton of a clearly established and consistently applied rule that a union does not act arbitrarily when its actions are necessary to enforce nondiscriminatory provisions of a collective bargaining agreement.

STATEMENT OF THE CASE

Petitioner Michael Harris was a long time member of Respondent Radio-Electronics Officers Union ("ROU" or "Union"),[2] a labor union representing radio officers on oceangoing vessels. At the time Harris sought employment through the ROU hiring hall, the ROU Shipping Rules, which were part of its collective bargaining agreements with employers using the hall, required that members and non-members alike must be in "good standing," meaning that members must have paid their dues and non-members must have paid their service fee for the quarter for which they desired to register. (Pet. 3).[3] In written news letters, the ROU had warned members that they were required to be in good standing to remain on the shipping list. (Pet. 4).

When Harris failed to pay his second-quarter dues by April 1, 1988, the ROU's computer automatically removed him from the hiring list. (Pet. 4). Harris there-

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[1] Rule 10 of the Supreme Court Rules contains three bases for granting the writ. The first two (subparagraphs (a) and (b)), relating to "conflicts" between circuit courts or states' highest courts, are not asserted here. Petitioner thus must show that this case falls under subparagraph (c) which requires that the Court of Appeals "has decided an important question of federal law which has not been, but should be, settled by this Court."

[2] The ROU is not a corporation pursuant to Rule 28.1 of the Supreme Court Rules. It is an unincorporated association and its parent body is the National Marine Engineers' Beneficial Association.

[3] "Pet." refers to Harris's Petition for a Writ of Certiorari and Appendix.

after filed an unfair labor practice charge, claiming that he should have been given individualized notice and an opportunity to cure before being dropped.[4]

An administrative law judge ("ALJ") held that the ROU had violated 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). The ALJ based his decision on his factual finding that the ROU was enforcing a "valid union security clause," [5] and therefore under Board precedent Harris was entitled to individualized notice and an opportunity to cure before being dropped.

The Board rejected the ALJ's reliance on union security cases for the fundamental reason that there was "no evidence in the record of a union-security clause." (Pet. 7). Nonetheless, the Board affirmed the unfair labor practice finding, reasoning that:

> * * * whenever a union prevents an employee from being hired, it demonstrates its power and influence over his livelihood so dramatically as to compel an inference that the effect of the union's action is to encourage union membership on the part of all employees who have perceived the display of power. A union may overcome that inference, however, either by acting pursuant to a valid union-security clause or by showing that its action was necessary to the performance of its representative function.[6] The Respondent has failed to overcome that inference. There is no evidence of a union-security clause here, and the Respondent has not shown that removing Harris from the national shipping list in the manner it did was necessary to the effective performance of its representative function.

(Pet. 19a).

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[4] When the ROU adopted a new bylaw on November 30, 1988 requiring that dues be received 15 days prior to the end of the calendar quarter to permit registration, he filed a second charge. (Pet. 4-5).

[5] 306 N.L.R.B. at 47; Pet. 28a.

[6] *Operating Engineers Local 18*, 204 N.L.R.B. 681 (1973).

The Court of Appeals agreed with the Board that "a presumption of illegality arises whenever an employee loses * * * a hiring opportunity as a result of a union's conduct," and that to rebut this presumption "the union must show either that its action was taken pursuant to a valid union security clause, or that it 'was necessary to the effective performance of its function of representing its constituency.' " (Pet. 8a).[7] It noted, however, that both the Board and the Circuit Courts had consistently held that the "necessity" defense is met whenever (1) "a good-faith desire to abide by [the union's] contractual duties * * * prompted the action that led to the employee's * * * loss of a job opportunity" (citing, *Road Sprinkler Fitters Local Union No. 669, supra* at 12 and *United Bhd. of Painters, Local Union No. 487 (American Coatings, Inc.)*, 226 N.L.R.B. 299, 301 (1976)), or (2) the union acts "to enforce union administrative rules that are neutral, clearly established, and consistently applied," citing *e.g., Boilermakers Local No. 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988); *NLRB v. Ironworkers Local Union No. 505*, 794 F.2d 1474, 1478 (9th Cir. 1986); *Teamsters Local No. 519 (Rust Engineering)*, 276 N.L.R.B. 898, 902, 908 (1985). Because "Harris's automatic delisting for failure to pay dues was required by the Union's established hiring hall rules," the Court of Appeals concluded that the necessity defense was met and therefore reversed the Board's unfair labor practice finding.

Finally, the Court of Appeals rejected the Board's reliance on union security clause cases requiring a union to provide individualized notice of a delinquency and an opportunity to cure before seeking an employee's discharge for failure to pay union dues. It reasoned that:

> * * * the Board found no evidence of a union security clause in the Union's collective bargaining agree-

[7] Quoting, *Road Sprinkler Fitters Local Union No. 669 v. N.L.R.B.*, 778 F.2d 8, 11 (D.C. Cir. 1985).

> ments, and the Board does not dispute that the Union's hiring hall was open to non-members as well as members. Therefore, the rationale for a stringent notice standard is absent here, and the union security clause cases are inapposite.

(Pet. 11a).

REASONS FOR DENIAL OF WRIT

I. THIS CASE PRESENTS NO QUESTION INVOLVING A "CLOSED SHOP"

Questions II and III of Harris's petition are predicated upon the notion that the union in this case was running an "illegal closed shop." *See* Pet., Parts II and III, pp. 11-20. That premise, however, is pure fantasy. Neither the ALJ, the Board nor the Court of Appeals made a finding that the union was running a "closed shop." To the contrary, as is shown by the excerpt of the shipping rules quoted by Petitioner (Pet. 3), the hiring hall admittedly was open both to members and non-members alike. (Pet. 3). Far from operating a closed shop which (according to Petitioner's definition) restricts employment only to union members (Pet. 12, n.42), there was no evidence in this record of even a "union security clause," which would have compelled radio officers to become union members after being referred for employment.[8] Given these findings, and the absence in the record of evidence of either a closed shop or union security clause, Petitioner's arguments for the granting of the writ should be denied.

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[8] Petitioner concedes that the Board and the Court so found, but argues that those findings are not supported by substantial evidence. (Pet. 20). While quoting portions of the collective bargaining agreement in the record demonstrating that the hiring hall is the exclusive source of referrals (Pet. 20-21), Petitioner quotes no language which would require that every radio officer referred join the union—the *sine qua non* of a union security clause. (Pet. 12, n.42). In any event, this dispute as to the correctness of a factual finding hardly presents an issue worthy of this Court's consideration.

II. THIS CASE PRESENTS NO QUESTION INVOLVING A UNION-SECURITY CLAUSE

Question IV of Harris's petition asks the Court to decide whether parties to a collective bargaining agreement can evade a finding that a "union-security" arrangement exists by establishing that arrangement in a "separate document." As stated above, both the Board and the Court of Appeals explicitly addressed the issue of whether there was evidence in the record of a union-security clause, and both concluded that there was not. *See supra* at 3-5. Harris points to no such evidence, and the record shows that employees referred from ROU's hiring hall were not required to be union members, but that the hiring hall was open to members and non-members alike. To the extent that Harris now claims that the language of this specific contract was an "artifice" to avoid a finding of a union-security clause, that debate over the import of the contractual language is not worthy of the grant of certiorari.

III. THE "ARBITRARY CONDUCT" ISSUE ASSERTED BY PETITIONER MERELY SEEKS FURTHER REVIEW OF THE FACTS OF THIS CASE

In Question I of his petition, Harris contends that this case "squarely presents" an issue of construction of the National Labor Relations Act ("NLRA") "reserved" by this Court in *Breininger v. Local No. 6, Sheet Metal Workers*, 493 U.S. 67 (1989).[9] Question V raises the issue of whether "arbitrary" conduct by a union in the administration of the hiring hall violates the NLRA (Pet. 23), a question also arising from the duty of fair representation discussed in *Breininger*.

Petitioner strains to create seeming tension between the Board's opinion and the Court of Appeals' reasoning, suggesting that this divergence poses an important fed-

[9] Although Petitioner lists this question first, he devotes to it less than a half page of his thirty page brief.

eral question reserved by this Court in *Breininger* (*i.e.*, whether arbitrary conduct which violates the judicially created duty of fair representation necessarily amounts to an unfair labor practice under section 8(b)(1)(A) of the Act). The short answer is that the Court of Appeals did not hold that ROU's conduct, though arbitrary, was not an unfair labor practice. Rather, the Court of Appeals applied *exactly the same legal standard* followed by the Board in concluding that ROU's action was not arbitrary, but was necessary to enforcement of a "neutral, clearly established, and consistently applied" hiring hall rule that required all applicants to pay dues (or in the case of non-members, hiring hall fees) in advance in order to use the hiring hall. *See supra* at 4. That decision does not present the issue "reserved" in *Breininger*; rather, it involves no more than a routine application of a well-settled rule of law.

To the extent that Petitioner seeks to reach beyond *Breininger*, the issues which he raises go to the minutiae of this case, and do not confront the "important questions" that are essential for the granting of a petition. Thus, Harris argues that the conduct of the union toward him was "arbitrary" because even if he had "knowledge of the rule," he "might have inadvertently failed to mail his check." (Pet. 28). These are not the type of issues that should be offered to the Court on a petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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